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In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN, *Petitioner,*

v.

CITY OF NEW YORK, et al., *Respondents.*

[Caption Continued on Inside Cover]

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER STATE OF WISCONSIN

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BEST AVAILABLE COPY

STATE OF OKLAHOMA, *Petitioner*,

v.

CITY OF NEW YORK, et al., *Respondents*.

UNITED STATES DEPARTMENT OF COMMERCE, et al., *Petitioners*,

v.

CITY OF NEW YORK, et al., *Respondents*.

QUESTION PRESENTED

Whether the July 15, 1991, decision of the Secretary of Commerce not to substitute statistically adjusted census numbers for the 1990 decennial census totals previously reported by the President for the reapportionment of Congress and transmitted to the states for use in redistricting was consistent with the language of the Constitution and the constitutional goal of equal representation.

LIST OF PARTIES

The parties to the proceeding in the court of appeals were the City of New York; State of New York; City of Los Angeles; City of Chicago; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; City of Atlanta, Georgia; Maynard Jackson, individually and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernardino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona, and Council of Great City Schools; the United States Department of Commerce; Ronald H. Brown, Esq., as Secretary of the United States Department of Commerce; Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Barbara Everitt Bryant, as Director of Bureau of Census; William J. Clinton, as President of the United States; Donnald K. Anderson, as Clerk of the United States House of Representatives; Michael Espy, as Secretary of Agriculture; Donna E.

Shalala, as Secretary of Health & Human Services; Henry Cisneros, as Secretary of Housing & Urban Development; Robert B. Reich, as Secretary of Labor; Federico Pena, as Secretary of Transportation; Richard W. Riley, as Secretary of Education; State of Wisconsin and State of Oklahoma.

The People of the State of California *ex rel.* Daniel E. Lungren, Attorney General, and County of Hudson, New Jersey, were parties to the proceedings in the district court, whose judgment was vacated by the court of appeals, but were not parties to the proceeding in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[1] is reported at 34 F.3d 1114 (2d Cir. 1994). The opinions of the district court (Pet. App. 41-95, 96-120, 121-34) are reported at 822 F. Supp. 906, 739 F. Supp. 761 and 713 F. Supp. 48. The decision of the Secretary of Commerce (Pet.-App. 135-415) is published at 56 Fed. Reg. 33582.

JURISDICTION

The judgment of the court of appeals was entered August 8, 1994. The State of Wisconsin petitioned for rehearing on August 22, 1994, which was denied on January 4, 1995 (Pet. App. 416-18).[2] Wisconsin filed a petition for writ of certiorari in No. 94-1614 on April 3, 1995. Oklahoma filed a petition for writ of certiorari in No. 94-1631 on April 4, 1995. On March 27, 1995, Justice Ginsburg extended the time for the Government's filing of a petition for writ certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time within which to file to and including June 3, 1995. On June 3, 1995, the Solicitor General filed a petition for writ of certiorari in No. 94-1985. The petitions were granted on September 27, 1995, and the cases were consolidated (J.A. 109-111). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const.

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[1]References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

[2] The State of Oklahoma's petition for rehearing was denied on December 12, 1994 (Pet. App. 419-21).

amend. XIV, § 2; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and U.S. Const. amend. XV, § 1. Statutes involved are 2 U.S.C. § 2a, 13 U.S.C. § 141 and 13 U.S.C. § 195. The pertinent text of these provisions is set forth at Pet. App. 422-27.

STATEMENT OF THE CASE

This case concerns claims that the United States Constitution mandates the use of specific methodological innovations in taking the decennial census.

In October 1987, the Department of Commerce announced its decision that it would not attempt to statistically adjust the results of the 1990 census, as it had also decided with respect to the 1980 census. Litigation regarding the 1980 census ended in December, 1987, with the decision in *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987), upholding the census. In November, 1988, New York City, Los Angeles, Chicago, Dade County, Florida and the states of New York and California, joined by several interest groups and individuals, filed suit to compel the Department of Commerce and the Census Bureau to undertake statistical estimation procedures designed to "correct" anticipated errors in the 1990 decennial census, this time venuing the action in the Eastern District of New York (R. 1).[3] Plaintiffs' complaint alleged that the census as planned would result in an undercount of the population, that the undercount would be differentially concentrated among racial and ethnic minorities and that, as a result, states and cities with large

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[3]New Jersey, Florida, Texas, New Mexico, Arizona and the District of Columbia subsequently joined the suit as plaintiffs-intervenors (R. 130, 145, 161, 206, 207, 223). Following the July 15, 1991, decision of then-Secretary of Commerce Robert Mosbacher not to adjust the results of the 1990 census, Wisconsin and Oklahoma intervened as defendants (R. 213, 276). Two related district court actions, *City of Atlanta v. Mosbacher*, No. 92-CV-1566 (N.D. Ga.), and *Florida House of Representatives v. Franklin*, No. 92-CV-2037 (N.D. Fla.), were later consolidated with the New York proceedings (R. 323. 332).

minority populations would be undercounted relative to other states and regions, causing a loss in representation and in census-based allocations of federal monies (J.A. 44-45, 48). Plaintiffs alleged that post-census statistical estimation techniques provided a feasible method for correcting the anticipated undercount (*id.* at 46-47). The failure to employ this specific census procedure was alleged to violate U.S. Const. art. I, § 2, by failing to conduct "the most accurate census practicable," and to discriminate "with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted," in violation of Fifth Amendment equal protection guarantees (J.A. 48). Plaintiffs did not contend that the differential undercount resulted from a discriminatory purpose or that, given the Census Bureau's decision to adhere to an "actual enumeration," the Bureau would not attempt "to arrive at as accurate a figure as humanly possible" (Pet. App. 99). Statutory claims were asserted under 2 U.S.C. § 2a, 13 U.S.C. § 141 and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (J.A. 48-49). Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202 and 5 U.S.C § 702 (J.A. 40).

A. Stipulation to Conduct Post-Enumeration Survey.

Following the district court's denial of the Government's motion to dismiss and motion for summary judgment (Pet. App. 121-34), the parties entered a stipulation, approved by the court on July 17, 1989, under which the Secretary of Commerce agreed to reconsider *de novo* whether to carry out a statistical adjustment of the 1990 census (J.A. 61-67). The stipulation required that the decision be made by July 15, 1991, and in accordance with published guidelines articulating the relevant technical and

nontechnical statistical and policy grounds for the decision (*id.* 62-63).[4]

The Census Bureau went forward as planned with the vast statistical undertaking of attempting to count every person living in the United States as of April 1, 1990, resulting in a resident population count of the United States of 248,709,873 and an apportionment count of 249,632,692 (Pet. App. 320). The enumeration process began with the development of comprehensive maps of each block in the United States, the identification of housing units on each block and included pre- and post-census review by state and local governments. The actual enumeration started with the basic mail-out/mail-back procedure, followed by multiple contacts with each household that did not return a census questionnaire, a 100% recheck of vacant or uninhabitable units, a "Were you counted?" advertising campaign, a parolee and probationer check, and a housing coverage check (*see generally id.* at 319-32). Aware of differential census coverage rates for minority populations in earlier censuses, the Census Bureau mounted the most extensive effort ever to enumerate African-Americans and other minorities.[5] State and local governments were free to

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[4]The district court subsequently upheld the guidelines established by the Commerce Department against the plaintiffs' challenge that they violated the stipulation and were biased against adjustment (Pet. App. 110-18). In the same decision, the court granted plaintiffs' declaratory judgment that statistical adjustment would not violate either the Constitution's requirement of an "actual enumeration," U.S. Const. art I, § 2, cl. 3, or 13 U.S.C. § 195 (Pet. App. 107-110). Section 195 of Title 13 of the U.S. Code directs the use of sampling, where feasible, in carrying out the Department's census functions, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several states . . . ."

[5]As described by Census Director Bryant in her recommendation to Secretary Mosbacher (J.A.76):

encourage census participation. For example, both Wisconsin and Detroit mounted census awareness and outreach campaigns.[6] As subsequently measured by the PES, the 1990 census counted 98.4% of the total population.[7]

Despite this accomplishment, problems remained. The return rate of questionnaires during the initial mail out/mail back phase was only 63% (*id.* at 15, 327-28), although in Wisconsin it exceeded 76%, representing the highest voluntary response rate in the country (J.A. 98; *see also* A.R. App. 6 at 40). Moreover, despite the efforts to enumerate minority residents, the undercount differential was not reduced below historic levels (J.A. 76).

Pursuant to the July 1989 stipulation, the Census Bureau began conducting a Post-Enumeration Survey, or PES, nearly three months after the April 1 census date (Pet. App. 336). The PES procedure consisted of stratifying the population into 1,392 mutually exclusive poststrata defined by geography, race/ethnic group, housing tenure, age and sex (*id.* at 52 n.5, 164). Data obtained from a

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This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations--most minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multi-language enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods.

[6]*See* J.A. 95-101; Administrative Record ("A.R.") App. 6 at 40 (Wisconsin); Pet. App. 174 (Detroit).

[7]The 1.6% undercount estimate reflects a correction of an original 2.1% estimate resulting from the discovery of a computer coding error and the correction of errors in 104 sample block clusters thought to have a major impact on bias in the original estimates (Tr. 1782-83, 1786-92; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993).

sample consisting of roughly 377,000 people (*id.* at 157), or approximately one-sixth of one percent of the national population, were matched to data obtained in the census[8] to estimate census coverage rates for each poststratum (*id.* at 76 n.23, 169-70, 336-40). The overwhelming majority of the nation's 39,000 local jurisdictions were unrepresented in the sample (*id.* at 80, 212; A.R. App. 13[9] at 4). The construction of the PES meant that an average sample of roughly 300 people was used to estimate census coverage rates for each demographic post-stratum (A.R. App. 13 at 3), on average containing roughly 180,000 people. The PES did not sample states individually but aggregated them into nine census divisions (Pet. App. 164, 342-43, 370-72). For example, only 141 blocks from Wisconsin, the least populous state in the East North Central census region, were included in the sample (*id.* at 372). The state's undercount estimate was primarily based on data obtained in 947 blocks sampled in Illinois, Indiana, Michigan and Ohio (*id.* at 371-72). California dominated the sample uses to estimate state populations in the Pacific census division, providing nearly half of the division's 1,390 blocks included in the sample (*id.* at 370-72; *see also* A.R. App. 13 at 3-4). The PES relied on the assumption of sample homogeneity--that persons in each poststratum were homogeneous with respect to their probability of being missed by the census (Pet. App. 79, 205).

Based on the sample observations, as well as the imputation of nearly nine million people for whom match status between census and survey could not be determined (*id.* at 75-76, 170), an estimate of the undercount or overcount rate for each poststratum, called an adjustment factor, was derived using the statistical technique of dual system estimation (*id.* at 340-42). The raw adjustment

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[8]Confusingly referred to as the P-sample (population) and E-sample (enumeration) (Pet. App. 76 n.23). Only one sample was taken.

[9]D. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991).

factors exhibited significantly greater variability than had been anticipated during the design of the PES, and a statistical technique known as "smoothing" was used to reduce this variability (*id.* at 57 n.10, 219-27).

"Selected PES" estimates were completed in June 1991 (A.R. App. 10 (June 13, 1991, Release)). As originally calculated, the PES estimated that the 1990 census had resulted in a 2.1% undercount of the national population (Pet. App. 58). Consistent with earlier studies, coverage rates were found to be disproportionately lower for racial and ethnic minorities, estimated to range from 94.8% for Hispanics to 98.8% for non-Hispanic whites (*ibid.*). Coverage rates also varied by state, although the relation between minority and state undercounts was often counter-intuitive.[10] The June 1991 undercount estimates for every state in the New England, Middle Atlantic, East North Central and West North Central census regions were below the national average, meaning that each state in the Midwest and Northeast, including the plaintiffs New York and New Jersey, would lose population as a percentage of the national population under the adjusted numbers (A.R. App. 10, Tables 1, 5 (June 13, 1991, Release)). Had the June 1991 estimates been used as the apportionment census, California and Arizona would have each gained, and Wisconsin and Pennsylvania would have each lost, one seat in the House of Representatives (Pet. App. 17).

B. The Secretary's Adjustment Decision.

On July 15, 1991, then-Commerce Department Secretary Mosbacher announced his decision not to adjust

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[10]For example, Montana, Idaho and Wyoming were each reported to have undercount rates roughly double those estimated for New Jersey, Michigan and Illinois (A.R. App. 10, Table 1). Rhode Island's estimated undercount of 0.3%, the lowest in the country, was one-fourth the undercount for non-Hispanic whites nationally (*ibid.*).

the 1990 census[11] (Pet. App. 135-415). Explaining his decision, Secretary Mosbacher stated that he was deeply troubled by the persistence of a differential undercount of minority populations and expressed regret that adjustment was unable to address this problem without adversely affecting the integrity of the census (*id.* at 138-39). The Secretary acknowledged that a statistical adjustment would likely increase the "numeric accuracy" of the census (*id.* at 184-85, 200). He explained, however, that the constitutional purpose of the census was not simply to count the total number of people in the United States but to locate them so that political representation could be allocated to the states and to their residents in proportion to their numbers. Accordingly, he concluded that the primary criterion for accuracy should be distributive rather than numeric accuracy (*id.* at 200-201). The Secretary found that while the adjusted numbers appeared to come closer to giving the nation's total population than the enumeration census, the census numbers displayed greater distributive accuracy than the adjusted counts and represented the most accurate count of the population of the United States at the state and local levels (*ibid.*).

The Secretary's statistical evaluation of the competing census results (adjusted and unadjusted) was

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[11]A Special Advisory Panel appointed to advise the Secretary on the adjustment decision pursuant to the July 1989 stipulation split evenly in recommending in favor of and against adjustment, with all of the members nominated by the plaintiffs recommending adjustment (Pet. App. 59). Based on the Census Bureau's "loss function" analysis, a majority of the Census Bureau's Undercount Steering Committee supported the adjusted numbers as being the more accurate (*id.* at 59). The late discovery of an error in the calculation of loss function values was subsequently reported to weaken, but not change, the majority's conclusion (*id.* at 190-91, 244-45). While recommending in favor of adjustment, the Director of the Census Bureau also recognized that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree" (J.A. 73). The Under Secretary for Economic Affairs and the Administrator of the Economics and Statistics Administration recommended against adjustment (Pet. App. 59).

highly technical and comprehensive. The Secretary expressed concern regarding the introduction of errors in the PES in the process of attempting to determine whether people included in the sample had been counted in the census. He noted that for 1.7% of the P-sample and 2.1% of the E-sample, match status could not be resolved and had to be imputed using a logistic regression model. When weighted up to the national population, imputed matches represented nearly nine million people, a number almost twice as large as the estimated net national undercount (*id.* at 75-76, 170).

The Secretary also found troubling the large measured bias in the PES estimates. At the time of the July 1991 adjustment decision, preliminary results of the Census Bureau's total error model indicated that the PES was biased towards overestimating the undercount and that a biased-corrected estimate would be about 1.4% rather than the estimated 2.1%. This meant that roughly a third of the net undercount adjustment came from bias in the PES. Biases in the PES also tended to be higher for minority evaluation strata (*id.* at 180). In addition, the Secretary concluded that uncertainty about the true variance of the adjusted figures meant that even their superior numeric accuracy had not been definitively demonstrated (*id.* at 201). The Secretary found that the loss function analyses and hypothesis tests that had been prepared by the Census Bureau at the time of the adjustment decision supported the superior accuracy of the census counts, when distributive accuracy was considered and when reasonable estimates of the error variance of the alternative DSE were used (*ibid.*). Noting that the results of PES evaluation studies had not been completely analyzed by the time of the decision and that the statistical tools used to calculate and evaluate the adjusted counts were at the cutting edge of statistical research, Secretary Mosbacher expressed deep concern that if an adjustment were made, it would be on the basis of research conclusions that might well be reversed in the next several months (*id.* at 248).

The Secretary also identified substantial evidence which cast doubt on the homogeneity assumption underlying the entire synthetic adjustment methodology (*id.* at 204-13). In addition, the Secretary reported that small changes in adjustment methodology were capable of moving seats in the House of Representatives (*id.* at 228). The single methodological decision to exclude 28 out of 1,392 variance outliers during the process used to "smooth" the raw adjustment factors was alone sufficient to shift a House seat from Pennsylvania to Arizona (*id.* at 220). One member of the Special Advisory Panel had calculated the states' populations using five modifications to the PES's modeling assumptions. Each produced a different apportionment of Congress (*id.* at 218). The Secretary identified "the bundle of statistical techniques contained in the smoothing process" as one of the most problematic aspects of the adjustment process (*id.* at 228), finding that the techniques relied heavily on statistical assumptions, resulted in large changes in adjustment factors and might very well have led to an overstatement of the undercount (*id.* at 219-28).

In addition to concluding that the adjusted numbers did not improve, but more likely worsened, the distributional accuracy of the census, the Secretary identified policy considerations militating against adjustment. The sensitivity of the PES results to modeling assumptions not only impaired their usability but opened the census to the risk of political manipulation (*id.* at 213-28). Statistical estimation also undermined incentives to future census participation, including state and local support for future censuses (*id.* at 228-38). Adjustment also risked significant disruption to the orderly transfer of political representation that would result from changing the census numbers already reported by the President for the apportionment of Congress and used by the states in redistricting (*id.* at 249-56).

C. District Court's Decision Upholding Adjustment Decision.

Following the Secretary's decision, the district court permitted extensive discovery and then set the case for trial. The 13-day trial consisted almost exclusively of expert demographic and statistical testimony and produced thousands of pages of exhibits (Pet. App. 60-61). Evidence was presented that in attempting to correct for bias in the original PES estimates, the Census Bureau discovered errors whose correction reduced the national undercount estimate to 1.6% (Tr. 1786-87, 1790-91; DX 31 (Tr. 1790-92)); *see also* 58 Fed. Reg. 69, 73 (Jan. 4, 1993). Correction of these errors changed state undercount estimates as well, but not uniformly.[12] Less technical evidence regarding Wisconsin's experience in the census and the disruption adjustment would cause to Oklahoma's redistricting process was submitted by stipulation and affidavit (J.A. 95-101, 102-108). On April 13, 1993, the district court issued a decision upholding the Secretary's decision against adjusting the 1990 census (Pet. App. 43-95). The court also ordered the release of block-level adjusted census data to the plaintiff states (*id.* at 91-95).

The district court adhered to its earlier ruling that the Secretary's decision would be reviewed under the APA's arbitrary and capricious standard (*id.* at 63-66; *see also id.* at 129-33). The court agreed with the Secretary's decision to focus on distributive, rather than numeric, accuracy, given the census's function in distributing political representation and economic benefits

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[12]New Mexico's estimated undercount fell by the largest amount, 1.44%. Both Arizona's and California's undercount estimates were reduced by 0.92%, which, in the case of California, would have represented nearly 275,000 people. New Hampshire's undercount increased by 0.22%. New Jersey's estimated undercount fell to 0.57%, more than a percentage less than the revised national undercount. Pennsylvania's undercount estimate was reduced by 0.34%, while Wisconsin's was reduced by 0.06% (DX 31, Attachment 4).

(*id.* at 77-78). The court engaged in a detailed review of the adjustment decision under each of the Department's eight published guidelines (Pet. App. 69-89).[13] While finding the adjustment decision reasonable under each of the guidelines, the court commented, with little explanation, that were it "called upon to decide this issue *de novo*, I would probably have ordered the adjustment" (*id.* at 89). Nevertheless, the court agreed with one of the Census Bureau's principal statisticians that "'reasonable statisticians could differ on this conclusion'" (*id.* at 91), concluding that the Secretary's decision had been neither arbitrary nor capricious (*ibid.*).

D. Court of Appeals' Decision.

All of the plaintiffs except California and Hudson County, New Jersey, appealed the district court's decision, arguing that because the case involved constitutional claims, it should be remanded for *de novo* review. On August 8, 1994, a divided panel of the United States Court of Appeals for the Second Circuit ruled that the judgment of the district court be vacated and the case remanded for further proceedings to determine whether the decision not to adjust was essential to the achievement of a legitimate governmental interest (*id.* at 4, 39-40).

The court first rejected Wisconsin's and Oklahoma's argument that statistical estimation of the apportionment census was barred by the statutory exception to sampling in the apportionment census contained in 13 U.S.C. § 195 (*id.* at 23-25). The court then reviewed the constitutionality of the adjustment decision under equal protection standards made applicable to the federal

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[13]Guideline One "mandate[d] that the actual count be considered the most accurate count of the population 'at the national state and local level, unless an adjusted count is shown to be more accurate'" (Pet. Ap. 71-72). The court found that the plaintiffs had failed "to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy" (*id.* at 78).

government by the Fifth Amendment (*id.* at 31-33). The court interpreted the district court's decision as having "implicitly found that the census did not achieve equality of voting power as nearly as practicable" (*id.* at 34). The court also characterized the decision to adhere to an acknowledged undercount as one which "disproportionately denies representation on the basis of race or ethnicity" (*ibid.*). Both consequences were identified as requiring heightened constitutional scrutiny (*id.* at 33-34).

Under established congressional redistricting standards, the court of appeals noted that once a plaintiff had shown "that a scheme was not the product of a good-faith effort to achieve equality, 'the burden shift[s] to the [governmental entity] to prove that the population deviations in its plan were *necessary* to achieve some legitimate state objective'" (*id.* at 37 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (emphasis added)). The court held that "the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable" (*id.* at 38). In particular, the court identified the Secretary's acknowledgement that the adjusted numbers would likely make the census more accurate nationally and reduce the disparate impact of census inaccuracies on minority groups (*ibid.*). The court pointed to the Secretary's valuing distributive over numeric accuracy, his concerns regarding potential manipulation of, and disincentives to, participation in future censuses and the foreseeability of the differential undercount as further evidence of his failure to make the required good faith effort (*id.* at 38-39). Summarizing, the court stated "that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable" (*id.* at 39). The court's only conclusion regarding the adjustment decision's effect on equality of representation in Congress was in its characterization of the Secretary's decision as "declin[ing] to make the generally improving

adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38). Other than noting that census inaccuracies could affect equality in intrastate redistricting (*id.* at 33), the court did not discuss the adjusted and unadjusted numbers' impact on equality in state-created congressional and legislative districts. Stating that the proper standard of review was not the arbitrary and capricious standard but the "more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 39-40), the court held that the burden shifted to the Secretary to show that the result of undercounting minorities furthered a legitimate governmental objective and was essential for the achievement of that objective (*id.* at 40).

Dissenting, Judge Timbers endorsed the thoroughness and reasoning of the district court's opinion and noted the conflict created by the court of appeals' decision with decisions of the Sixth and Seventh Circuits in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992) (Pet. App. 40).

SUMMARY OF ARGUMENT

1. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2777 (1992), held that census decisions affecting the apportionment of Congress will be reviewed for consistency with the language of the Constitution and the constitutional goal of equal representation. In this case, plaintiffs' claim was not that a census procedure was constitutionally proscribed, as was asserted in *Franklin v. Massachusetts*, but that the Constitution mandated the use of additional procedures--here, statistical estimation techniques--in taking the 1990 census. Plaintiffs alleged that this methodological innovation was capable of

"correcting" unintended errors in the census potentially having representational consequences. The issue of whether the Secretary acted constitutionally in not substituting statistically adjusted census results for the population totals previously reported by the President and provided to the states is framed by the broader question of whether the Constitution recognizes a judicially enforceable right to specific census innovations which are claimed necessary to achieve the "most accurate census practicable."

Wisconsin submits that at least where the procedures selected for taking the census do not represent a retreat from past efforts to take an accurate census, the Constitution does not create an entitlement to specific, previously untried, census innovations. The recognition of a judicially enforceable right to the most accurate census practicable conflicts with Congress' express constitutional and historically exercised authority to direct the manner of taking the census. U.S. Const. art. I, § 2, cl. 3. There is a fundamental difference between constitutionally proscribed census decisions and constitutionally mandated procedures. There are many procedures capable of improving census accuracy. No matter what procedures are selected, there will always be other procedures capable of producing a more accurate census. A standard of consistency is not a standard of mandated actions. As reflected in the Constitution's grant of congressional authority to determine the best way of taking the census, the choice of census procedures is an inherently legislative function involving complex technical and policy trade-offs, often entailing resource allocation decisions. As two decades of protracted litigation demonstrate, determining the impact of adopting a given census procedure on equality of representation rests on complex and highly uncertain predictions.

Recognizing a judicially enforceable right to procedures claimed necessary to achieving the most accurate census practicable creates an unworkable system of census governance. The census is a process intended to

confer finality and certainty in the decennial reallocation of rights of political representation. The strict statutory timetable established for taking, completing and reporting the census and for reallocating rights of representation in the national government based on its results reflects the need for finality. Claims to specific census innovations which result in litigation spanning more than half the decade can have no other consequence than to throw into disarray the already-completed process of state redistricting. Recognizing a constitutional entitlement to specific census innovations threatens the Balkanization of census decisions, as states forego Congress in favor of individual district court actions, to secure those procedures viewed as conferring the greatest benefit in the count. That census decisions have representational consequences is a truism. Yet, as recognized by the Seventh Circuit, claims to specific census innovations do "not ask [courts] to decree equality. . . . [but] to take sides in a dispute among statisticians, demographers, and census officials . . . ." *Tucker*, 958 F.2d at 1418. Simply by directing apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize law suits founded on disagreement with the Census Bureau's statistical methodology." *Ibid.*

2. In this case, the Second Circuit erred in concluding that the Secretary had failed to make a good-faith effort to achieve equality of representation as nearly as practicable and that the census denied representation on the basis of race or ethnicity. Because these conclusions were wrong, the court erred in holding that the adjustment decision was to be reviewed under heightened equal protection standards.

The application of Art. I, § 2 redistricting standards to census decisions is problematic. Good faith in redistricting reflects the objective feasibility of creating equal population districts, measured by a "relatively rigid mathematical standard," *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 464 (1992). Here, the Secretary

was faced with a myriad of complex statistical arguments regarding the relative distributional accuracy of two imperfect sets of census results, making the substitution of census numbers technically and constitutionally perilous. Because the constitutional purpose of the census is to allocate rights of political representation based on the distribution of the population among and within the states, the Secretary's focus on distributive, rather than numeric accuracy, did not demonstrate an absence of good faith, but the opposite.

The court of appeals wrongly concluded that the district court had "implicitly found" that the census failed to achieve equality of representation as nearly as practicable. With respect to the census's impact on intrastate redistricting, the court of appeals failed to recognize the plaintiffs' ability to use the adjusted numbers for redistricting subsequent to the district court's ordering the data's release. With respect to the census's impact on equality in the apportionment of Congress, the Second Circuit's characterization of the PES apportionment as "just as accurate" as the census apportionment meant that plaintiffs had not met the threshold burden, required even in Art. I, § 2 redistricting cases, of demonstrating improved equality of representation in Congress. *Karcher v. Daggett*, 462 U.S. at 730-31. Plaintiffs' failure to meet this burden was also reflected in the district court's express finding that they had failed to demonstrate the superior accuracy of the adjusted numbers at the national, state or local level and for any reasonable definition of accuracy.

The Second Circuit's concern regarding the differential undercount of minority populations was understandable but did not support its conclusion that the census denied representation on the basis of race or ethnicity. Representatives in Congress are apportioned to states, not to racial or ethnic groups. The question of whether the census denies representation on the basis of race or ethnicity is the same as whether the apportionment of Congress is wrong. Unless this is demonstrated, shifting seats in the House of Representatives from states with

relatively small, to states with relatively large, minority populations accomplishes nothing more than an arbitrary reallocation of rights of political representation.

3. Under *Franklin v. Massachusetts*' standard of consistency with the language of the Constitution and the constitutional goal of equality of representation, the Secretary's decision was constitutional. Plaintiffs did not contend that adherence to the 200-year practice of actual enumeration was inconsistent with constitutional text or history. Conflicts with constitutional language and principles were, however, present in the PES. The substitution of the estimates for the reported census would have disrupted on-going state redistricting efforts, a result conflicting with both the goal of equal representation and the need for census finality. State estimates were based on samples taken in other states, conflicting with the constitutional requirement that Congress be apportioned on the basis of each state's population. U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2. By removing the incentive to take part in the census, estimation would make future censuses more difficult to conduct, also hindering the goal of representational equality by causing future inaccuracies. More broadly, estimation acquiesces in citizen non-participation in the processes of self-government, particularly among those groups which have been least included in the political process. Vulnerable to political manipulation and producing highly unstable results, statistical estimation undermines the perception of legitimacy in the allocation of rights of political representation among and within states.

The Secretary's decision was consonant with the goal of equality of representation. Very serious concerns existed regarding the quality of the PES estimates, particularly as affecting their distributional accuracy. The district court held that the Secretary's comprehensive evaluation of the technical and policy issues bearing on adjustment had been reasonable. In this circumstance, the choice of census results was one necessarily "command[ing]

far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. The adjustment decision was constitutional.

ARGUMENT

I. THE RECOGNITION OF CLAIMS OF CONSTITUTIONAL ENTITLEMENT TO SPECIFIC CENSUS INNOVATIONS CONFLICTS WITH CONGRESS' CONSTITUTIONAL AUTHORITY TO DIRECT THE MANNER OF TAKING THE CENSUS AND CREATES AN UNTENABLE SYSTEM OF CENSUS GOVERNANCE.

A. Article I, § 2, cl. 3 (The Apportionment Clause), as amended by Section 2 of the Fourteenth Amendment, provides for the apportionment of Representatives in the House of Representatives among the states "'according to their respective Numbers,'" and directs that the "actual Enumeration" be taken every ten years, "in such Manner as [Congress] shall by Law direct." With the adoption of the Sixteenth Amendment, the census has the single constitutional purpose of providing the states' populations for apportioning Congress. *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

Montana, 503 U.S. at 457-58, held that decisions affecting the apportionment of Congress are justiciable. *Franklin v. Massachusetts* extended this holding to census decisions affecting the apportionment, 112 S. Ct. at 2776 n.2, stating that census decisions would be reviewed under a standard of consistency with the language of the Constitution and the constitutional goal of equal representation. *Id.* at 2777. The specific question in this case is whether the Secretary's decision not to substitute statistically estimated population totals for the 1990 census was consistent with constitutional text and

principles. That issue is framed by the broader question of whether the Constitution mandates the adoption of specific census innovations claimed to be necessary to achieve the most accurate census practicable.

The recognition of a judicially enforceable right to compel specific census innovations conflicts with the Constitution's express grant of congressional authority to direct the manner of taking the census and Congress' historic exercise of that authority. If courts are to decide which procedures will achieve the most accurate census practicable, then unless Congress directs that the census be taken in a manner that a court agrees will achieve the greatest practicable accuracy, Congress' decision will be unconstitutional.[14] While not stated, the recognition of a constitutional right to specific census procedures necessarily assumes some basic institutional inability on the part of Congress to address problems in the census and to direct the taking of an accurate census. This is to say that the Founders of the Constitution erred in allocating this constitutional function to the Legislative Branch. Yet there appear to be few, if any, historical examples to support this view. To the contrary, in 200 years, the decennial census has evolved into a highly professional, methodologically sophisticated and costly operation which each decade attempts to count a larger proportion of the population. While the census continues to contain unintended errors, this case is not in the realm of the embedded and extreme inequality presented in *Baker v. Carr*, 369 U.S. 186 (1962).

Plainly, there are a number of census decisions which would be constitutionally proscribed as inconsistent with constitutional language or the goal of equal

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[14]This view is reflected in *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), in which the question of whether the Constitution required an adjustment in the official population counts to reflect the differential undercount of minorities was held "not for the Congress, but for the judiciary."

representation. Conducting the census in a year not evenly divisible by ten, U.S. Const. art. I, § 2, cl. 3, assigning overseas military personnel to states based on place of birth, rather than "home of record" or other measure of current state ties,[15] delaying the reporting of census results until after the subsequent congressional elections or so late in the election cycle as to prevent their being used to reapportion Congress, or directing that census enumerators engage in substantially less canvassing of minority neighborhoods, are examples of census decisions which would be inconsistent with the language of the Constitution or its goal of representational equality.[16]

But plaintiffs' claim was not that the procedures employed in the 1990 census were constitutionally proscribed but that additional procedures were constitutionally mandated. A standard of consistency with constitutional goals and language is different from a standard of mandated actions. The possibility of alternative decisions being equally constitutional is suggested both in *Montana*, 503 U.S. at 463 ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course"), and *Franklin v. Massachusetts*, 112 S. Ct. at 2778 (finding Secretary's judgment to have been "consonant with, though not dictated by, the text and history of the Constitution"). As distinguished from congressional

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[15]*Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment) (noting inability to change "home of record" designation after entering military service as implicating constitutional requirements of accuracy and decenniality).

[16]Because Congress retains the authority to alter the apportionment reported by the President, it can also correct census abuses as well as innocent inaccuracies. *See* 2 U.S.C. § 2a(b) (apportionment of Representatives shown on states' Certificates of Entitlement effective "in each Congress thereafter until the taking effect of a reapportionment under this section or *subsequent statute*" (emphasis added)).

apportionment,[17] decisions regarding the census are noteworthy not only because of the nearly limitless number of procedural choices available, but because many decisions would properly be regarded as consistent with constitutional language and the goal of representational equality, notwithstanding the likely superiority of alternative or additional procedures as giving more accurate counts.

Hiring 400,000 enumerators should produce a more accurate census than employing 300,000, yet either level would seem constitutionally permissible. Assigning more enumerators on a per capita basis to states with large numbers of non-citizens or linguistic minorities would appear constitutionally permissible, even though its necessary consequence would be to reduce the per capita assignment in other states. Ten attempts at non-response follow-up should yield more accurate counts than six attempts, which should yield more accurate counts than four attempts. Yet the Constitution would seem satisfied whether four, six or ten attempts are made. Because the census is used to allocate rights of political representation over the next ten years, a census taken on October 1 should be more accurate in terms of providing more current population totals than one taken on April 1. Yet the choice of an April 1 census data should also be constitutional. If a post-census sample of 377,000 people stratified among

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[17]In the case of apportionment, Art. I, § 2 requires that each state be apportioned at least one Representative and that there be no fewer than 30,000 inhabitants per Representative once each state has been apportioned one. Congress must also select an apportionment that is related to population. *Montana*, 503 U.S. at 463. Beyond this, it seems very likely that congressional apportionment is required to reflect rough proportionality to the states' populations--if a state with a population of 1,000,000 is apportioned two Representatives, a state with a population of 2,000,000 cannot be apportioned eight. It may be that because mathematical analysis has concluded that only five methods of apportionment lead to a workable solution of the fractional remainder problem, *see id.* at 451-52, the selection of one of these methods is required.

1,392 mutually exclusive demographic strata produces results whose bias and variability present improvement in the census's distributional accuracy, the Constitution does not mandate a sample of two million people next be taken.

Decisions regarding the best way of conducting the census necessarily "command[] far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Review of census decisions should reflect the need for prompt determinations of validity or invalidity, so as to limit the impact of review on census finality. This counsels courts to avoid transforming review of census decisions into legislative determinations of the procedures best capable of producing the most accurate census practicable. In general, where challenged census procedures represent the adherence to, or reasonable modifications of, previous census practices and do not represent a retreat from attempts to obtain an accurate census,[18] they should be sustained. In general, unless their adoption would conflict with other constitutional principles, innovations to improve coverage should be sustained. Particularly where challenged census action consists of a decision *not* to adopt a specific methodological innovation, the decision should be upheld. It is not that decisions not to adopt specific census innovations are unreviewable, but that in nearly all cases they are constitutional. *Cf. Montana*, 503 U.S. at 458 (decision that a constitutional provision may not be judicially enforceable "is of course very different from determining that specific congressional action does not violate the Constitution"). If exceptions need to be recognized to this standard, they are not presented by a case in which the innovation being advanced represents a departure from a 200-year practice

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[18] Thus, in arguing that a constitutional entitlement to specific census innovations should not be recognized, Wisconsin is not suggesting that the wholesale abandonment of prior census procedures, unless replaced by new ones, would not be subject to constitutional constraints. This is not, however, what was being alleged here.

of actual enumeration, in which intense professional and scientific debate exists as to the feasibility of the innovation and its potential for introducing new errors into the count, and in which significant policy reasons, many of constitutional stature, militate against the procedure's adoption.

States, municipalities, citizen groups and individuals perceiving an advantage in a particular procedure or methodological innovation are free to petition Congress for its adoption.[19] Because all states are represented in Congress, states which would be adversely affected by a particular innovation are able to advance their interests or to offer alternative procedures. The selection of the many procedures which actually go into the taking of the census represents the outcome of an evolutionary process in which innovations are conceived of, debated, developed, tested, implemented, retained and abandoned in an attempt to achieve more accurate counts each decade. Once the methods of taking the census have been selected, each state has the incentive to encourage the greatest census response on the part of its residents within the established methodological framework.

B. The recognition of a constitutional right to the most accurate census practicable not only conflicts with the Constitution's grant of congressional authority but results in an untenable system of census governance. The recognition of these claims encourages states and municipalities to eschew Congress in favor of individual district court actions to compel those innovations perceived as conferring the greatest benefit in the count. This has the potential of producing different, if not inconsistent,

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[19]Congress did not enact any of the legislation introduced before and after the 1990 census to compel its statistical adjustment. *See* Congressional Research Service, *Decennial Census Coverage: The Adjustment Issue*, at 23-27 (Feb. 1, 1994), for summary of legislation introduced in the 100th through 103rd Congresses relating to census adjustment.

judgments as each court focuses on the particular innovation advanced by the plaintiffs before it. Unlike Congress, where all states are represented, adversely affected states are likely to be heard at all only if they submit to the jurisdiction of a court which would not otherwise have jurisdiction over them.

Claims to the adoption of specific census innovations inherently conflict with the need for finality and certainty in the decennial reallocation of representational rights, both among and within the states. This need is reflected in the strict statutory timetable established by Congress for taking and completing the census, for reporting its results to Congress and to the states and for translating the results into entitlements to representation in the national government.[20] Protracted litigation as the vehicle for deciding the best way of conducting the census threatens substantial disruption of state redistricting efforts. The effect of changing census numbers on states whose apportionments would change is plain. A state told that it has one less Representative than before cannot hold elections with its current districts. But even states whose apportionments do not change will witness an apparent change in district populations when census results are changed. Because Art. I, § 2 imposes a standard of precise mathematical equality in congressional redistricting, *Karcher v. Daggett*, 462 U.S. at 734, already-established

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[20]Under the current census statutes, April 1 is established as the decennial census date. 13 U.S.C. § 141(a). Under 13 U.S.C. § 141(b), the Secretary of Commerce is required to report the states' population totals to the President by December 31 of the census year. Under 2 U.S.C. § 2a(a), the President is to report the states' population totals and the new apportionment to Congress within the first week of its first session in the year following the census, with the apportionment determined using the method of equal proportions. The President's report establishes a state's entitlement to a particular number of Representatives. *Franklin v. Massachusetts*, 112 S. Ct. at 2773 (plurality opinion). Within fifteen days after the President's report, the Clerk of the House of Representatives is required to send to each state's governor a Certificate of Entitlement showing the state's new apportionment. 2 U.S.C. § 2a(b).

districts can be claimed to be unconstitutional. Either under Art. I, § 2 or state constitutional provisions,[21] states may either feel or be compelled to draw new congressional and legislative districts. Whether a state retains or redraws its districts, its choice could easily trigger litigation. At the same time, litigation which spans half the decade determining the best way of taking the census can ultimately provide at most a formal, rather than real, improvement in equality of representation. Correction of population totals as they existed on April 1, 1990, become increasingly less relevant to true equality as the decade progresses, which is the reason a new census is taken at the decade's end. There might be cases where the need for census finality must give way to superior constitutional commands, as where plainly unconstitutional action is not discovered until after Congress' election under the new census. A claim that specific methodological innovations are necessary to achieving census accuracy does not present such a case.

A judicially enforceable right to the most accurate census practicable invokes no clear standard of constitutionality. Article I, § 2 redistricting standards are not successfully engrafted onto census decisions merely by substituting the phrase "as accurate as is practicable" for "as equal as is practicable." The concept of practicability with respect to census accuracy is defined over the set of all possible census procedures which might be used in counting the population. Available choices range from decisions as broad as the level of census appropriations to decisions as specific as the actual assignment of enumerators, the script to be followed during non-response follow-up, or the length and format of census questionnaires. As previous examples regarding constitutionally permissible census procedures suggest,

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[21]*See e.g.*, Wis. Const. Art. IV, § 3 ("At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants").

whatever procedures are selected for taking the census, additional procedures can always be posited for improving census accuracy. Doubling the expenditure for targeted outreach should make the census more accurate. If a 400,000-person sample fails to improve accuracy, a post-census sample of a million can be posited which might. The examples also point to the fact that the choice of census procedures is an inherently legislative task, requiring the balancing of technical and policy trade-offs, often entailing resource allocation decisions. Increasing enumerator positions reduces resources available for other census programs or for non-census expenditures. Changing the date for taking the census or for reporting its results may improve accuracy, but at the cost of shortening the time for states to accomplish redistricting.

Even if the concept of census "practicability" had obvious boundaries, determining the effect of a specific census procedure's adoption on equality of representation at best involves complex and uncertain judgments for which "[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer."[22] *Montana*, 503 U.S. at 463. A court might be able to select census procedures believed to offer the best chances of ensuring the greatest number of people being counted, although it is unlikely to have any greater abilities in this regard than Congress or the Executive. But the constitutional basis for asking courts to compel specific census innovations is not the desirability of counting the greatest number of people but the ability to distribute the population correctly among the states. That the selection of census procedures will have representational consequences is a truism. Where small changes in state populations can change the

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[22]New York's and New Jersey's errors in predicting higher populations under statistical estimation present a good example. Philadelphia, also a plaintiff, would not only lose population as a share of the national total under the PES (A.R. App. 10 (June 13, 1991), Table 3 (estimated undercount 0.8% below national estimates)) but would suffer reduced representation in Congress resulting from Pennsylvania's loss of a House seat.

apportionment of Congress, the abstract recognition of the relation between census errors and representational rights does not confer the ability to predict accurately the impact of census innovations on representational equality.

The Sixth and Seventh Circuit's decisions in *Tucker v. U.S. Dept. of Commerce* and *City of Detroit v. Franklin* [23] reflect a deep and well-founded judicial skepticism, not as to the need for review of census decisions which contravene constitutional text or principles, but as to the courts' ability to mandate the adoption of specific census innovations in the guise of enforcing the Constitution.[24] In *Tucker*, a

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[23]Three court of appeals' decisions from the 1980 census concerned claims to statistical adjustment. *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (upholding preliminary injunction requiring procedures to correct errors in New York's and New York City's count; evidence of census undercount of minority populations held to establish likelihood of success on the merits in light of Art. I, § 2 congressional redistricting standard in *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), requiring voting equality "as nearly as is practicable"); *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981) (reversing and remanding district court's subsequent judgment on the merits; district court's broad sanction order for government's refusal to produce confidential master address registers held to punish unrepresented states which would be adversely affected by adjustment of single state's population by preventing full and fair disclosure of facts and adjudication of the merits), *cert. denied*, 455 U.S. 999 (1982) (*see also Klutznick v. Carey*, 449 U.S. 1068 (1980) (staying portion of district court's judgment enjoining the reporting of census results to President on December 31, 1980)); *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981) (reversing judgment compelling development of methods to statistically adjust census to correct for minority undercounts; plaintiffs held to lack standing and claim held not ripe because alleged loss of representation from undercount would result from the Michigan Legislature's intervening decision not to adjust the census in redistricting, which had not yet occurred), *cert. denied*, 455 U.S. 939 (1982).

[24]The Second Circuit's discussion of *Tucker* was limited to noting the Seventh Circuit's recognition that in redistricting cases plaintiffs are not required to prove that districting inequalities represent a deliberate effort to dilute an affected group's voting power (Pet. App. 36, citing *Tucker*, 958 F.2d at 1414). The court of appeals' decision did not discuss *City of Detroit*.

group of Illinois plaintiffs alleged that the existence of a differential undercount in the 1990 census would "cause[] them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures." *Id.* at 1412. The plaintiffs' suit sought to compel "an appropriate statistical adjustment for the undercount," *ibid.*, as part of the decennial census. The district court had dismissed the claim as presenting a non-justiciable political question. *Tucker v. U.S. Dept. of Commerce*, 135 F.R.D. 175 (N.D. Ill. 1991). On appeal, the Seventh Circuit ruled that the claim was not justiciable because the plaintiffs lacked standing in the sense of having litigable rights. *Tucker*, 958 F.2d 1415-17.

Decided a few months before *Franklin v. Massachusetts*, *Tucker* was predictive of the standard of review of census decisions subsequently established by this Court. The Seventh Circuit understood the plaintiffs' claim to be that without a statistical adjustment they would lose congressional representation.[25] While stating that the case was not a reapportionment case, *Tucker*, 958 F.2d at 1415, the court of appeals held that the claim was not barred under the political questions doctrine, stating that "the political sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are not greater here." *Ibid.* The court also recognized the judiciary's ability to decide census questions where established constitutional principles provide the grounds for the decision, as in a case "concern[ed] with discrimination rather than innocent inaccuracy" or, with greater reservations, with respect to a challenge to "some categorical judgment of inclusion or exclusion argued to be

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[25]*Tucker*, 958 F.2d at 1415-16 (noting that litigation had not been allowed to proceed to the point where the plaintiffs would be required to specify the adjustment sought, preventing a determination that they had nothing to gain from winning the case).

in violation of history, logic, and common sense." *Id.* at 1418 (citing *Com. of Mass. v. Mosbacher*, 785 F. Supp. 230 (D. Mass. 1992) (three-judge court), *rev'd sub nom., Franklin v. Massachusetts*, *supra*. In contrast to these types of claims, the Seventh Circuit held that merely by directing congressional apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Tucker*, 958 F.2d at 1418. Unable to find in the apportionment clause, the census statutes or the Administrative Procedure Act guidelines for taking an accurate decennial census, the court stated:

> So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this, . . . --that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.

Id. at 1417-18 (citations omitted). Contrasting the judicially administrable standard of voting equality in redistricting cases, the court characterized the plaintiffs' claim as one not asking a court to decree equality but "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Id.* at 1418.

In *City of Detroit*, the Sixth Circuit followed the Seventh Circuit's reasoning to uphold summary judgment dismissing a claim seeking to compel statistical adjustment of the 1990 census or to compel a recount of Detroit's residents. 4 F.3d at 1375-78. Concluding that states could use statistically adjusted census data in congressional redistricting, the court also affirmed the dismissal of a claim for lack of standing that unadjusted census data

would result in inequalities of representation in state redistricting. *Id.* at 1373-74.

The Sixth and Seventh Circuit's negative assessment of the courts' ability to decree equality by taking sides in disputes regarding the Census Bureau's statistical methodology resonates in the Constitution's positive grant of census authority. The issue raised by plaintiffs' claim is not whether a given census innovation is permissible, or even desirable, but whether the Constitution creates an entitlement to its adoption. The goal of equality is not demeaned, but respected, by recognizing the limits of the courts' ability to perform the inherently legislative function of determining how best to take the census. The existence of an unbounded set of procedures having the potential for improving census accuracy, the complex policy and technical calculus involved in the selection of census procedures, and the still greater complexity of determining the relation between census procedures and their impact on equality of representation make the decision whether to employ specific methodological innovations one for Congress, as the Constitution directs.

II. BY MISAPPREHENDING THE RELATION BETWEEN CENSUS ACCURACY AND EQUALITY OF REPRESENTATION, THE COURT OF APPEALS ERRED IN HOLDING THAT THE ADJUSTMENT DECISION WAS SUBJECT TO HEIGHTENED EQUAL PROTECTION SCRUTINY.

A. In concluding that Secretary Mosbacher had not made the required effort to achieve equality as nearly as practicable, the court of appeals referred to "Congress's expressed intent to encourage such use [of statistics]" (Pet. App. 38), an apparent reference to the court's earlier

holding that 13 U.S.C. § 195[26] does not preclude the use of sampling in the taking of the reapportionment census. The court held to the contrary that the statute's legislative history revealed "that a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged" (Pet. App. 25).

The court incorrectly interpreted § 195. When enacted in 1957, § 195 permitted the use of sampling "[e]xcept for the determination of population for apportionment purposes."[27] The current statutory language reflects its 1976 amendment (P.L. 94-521, 90 Stat. 2464) to require, rather than simply permit, sampling where feasible. The same law amended 13 U.S.C. § 141(a) to authorize the Secretary of Commerce to determine the "form and content" of "the decennial census of the population . . . including the use of sampling procedures and special surveys." The court of appeals correctly viewed the legislative history of the amendments to §§ 141(a) and 195 as revealing a congressional intent to encourage the use of sampling. *See* Pet. App. 24-25. However, the same legislative history, like the express language of § 195 both before and after amendment, specifically excepted the use of sampling for apportionment

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[26]"Except for the determination of population for purposes of apportionment of Representatives among the States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195.

[27]As originally enacted, 13 U.S.C. § 195 provided: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." P.L. 85-207, § 14, 71 Stat. 484.

purposes.[28] The term "census of the population," as used in § 141(a) is defined in § 141(g) to mean a "census of population, housing, and matters relating to population and housing." No conflict exists between § 195's prohibition of sampling for purposes of obtaining the population used in apportionment and § 141(a)'s and § 195's encouragement of sampling for other purposes. When determining the apportionment census, the Secretary is not authorized to use sampling. For other census purposes--such as determining the portion of a state's population living in owner-occupied housing--the Secretary is encouraged to use sampling, where feasible.[29]

B. The court of appeals' greater error lay in concluding that the enumeration census denied representation on the basis of race or ethnicity and that the Secretary had failed to make the required good faith effort to achieve equality of representation as nearly as practicable. Based on these conclusions, the court incorrectly held that the adjustment decision was subject

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[28]The court of appeals quoted the language of S. Rep. No. 1256, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468, which states:

> Section 10 amends section 195 of title 13, U.S.C., to require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of this title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from present language which grants the Secretary discretion to use sampling when it is considered appropriate. The section as amended strengthens congressional intent that, whenever possible, sampling shall be used.

The court emphasized the last sentence (Pet. App. 25).

[29]Thus, the *in pari materia* construction of §§ 195 and 141 as permitting sampling in the apportionment census in *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980), and followed by the district court here (Pet. App. 110 n.7) is incorrect.

to heightened scrutiny under Art. I, § 2 congressional redistricting standards and under equal protection standards governing racial classifications.

The ability to engraft Art. I, § 2 redistricting standards onto census decisions is problematic. In the case of intrastate congressional districting, "Article I, § 2 . . . 'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Karcher v. Daggett*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). The ability to put forward a redistricting plan, either considered by the Legislature or developed by the plaintiff, which achieves smaller population deviations than the state plan establishes a state's failure to make a good faith effort to achieve equality of representation as nearly as practicable.[30] The concept of good faith reflects objective feasibility rather than an impressionistic assessment of subjective purpose.

In contrast to state redistricting standards, for the 1990 census no rigid formula existed for determining whether the estimated population totals were better than the original census in the constitutionally relevant sense of improving equality of representation in Congress. Instead, the Secretary was presented with a myriad of complex statistical arguments, subject to intense dispute among statisticians and demographers, concerning the relative distributional accuracy of two sets of numbers, each known not to represent "true" population totals.

The concerns identified by the court of appeals as underlying the decision not to adjust read not as an indictment of the decision but as proof of the Secretary's reasoned evaluation of an exceedingly complex and constitutionally perilous issue. As summarized by the

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[30]Thus, in *Karcher v. Daggett*, the plaintiffs were able to sustain their threshold burden by pointing to several plans considered, but not adopted, by the New Jersey Legislature which resulted in smaller population deviations than the 0.6984% maximum deviation under the challenged plan. 462 U.S. at 738.

court, the Secretary was concerned that adjustment might result in an incorrect apportionment of Congress (Pet. App. 19, 38). Half of his advisors believed that accuracy at the state and local levels would not be improved (*id.* at 19). Uncertainty as to the methods of adjustment and their underlying assumptions created the danger that an adjustment would be made on the basis of research conclusions that might well be reversed in the next several months (*ibid.*). Because the effects of different adjustment methods could be known in advance, the adjustment process might become subject to political manipulation (*id.* at 19, 38). The Secretary also found that adjustment would not result in greater distributive accuracy and that statistical estimation would undermine future census participation by removing the incentive for states to cooperate in the census (*id.* at 38).

Given its interpretation of the district court's decision as having "implicitly found" that the census failed to achieve equality of representation and its characterization of the Secretary's adherence to the census as denying representation on the basis of race or ethnicity (*id.* at 34), the court of appeals' decision suggests that the court viewed the adjusted numbers as clearly superior to the enumeration census in terms of achieving equality of representation either with respect to the apportionment of Congress or in state redistricting. Yet other parts of the decision contradict this interpretation. In summarizing the adjustment decision, the court stated that the Secretary had "conced[ed] that the adjustments would likely bring greater accuracy in the count at the national level" but that he had expressed a principal concern "that adjustment might not improve distribution of Representatives among the states" (*id.* at 19). The court returned to the effect of adjustment on congressional apportionment in summarizing its reasons for finding that the Secretary had not made a good faith effort to achieve equality of representation. The court pointed to the Secretary's statement "that an adjustment would not be made because it would not result in *greater* distributive accuracy," as

revealing that "he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate" (*id.* at 38 (emphasis in the original)). The court did not state that the evidence established that the adjusted counts resulted in the correct apportionment of Congress or that adherence to the original counts caused an incorrect apportionment. The court of appeals did not make any finding with respect to the adjusted numbers' impact on equality of representation in intrastate districting and did not discuss the plaintiffs' ability to achieve intrastate equality by using the adjusted data ordered released more than a year before.

The court emphasized the perceived numeric accuracy of the adjusted numbers, particularly at the national level, as a key fact demonstrating the Secretary's lack of good faith. The court's emphasis on numeric accuracy not only highlights its misconception of the relation between census accuracy and equality of representation but underscores the Secretary's good faith in *not* focusing on this aspect of census accuracy. A census which achieves "true" numeric accuracy in the count of the national population has no inherent superiority over one which does not. What makes one set of numbers constitutionally superior is its ability to distribute correctly a given national population among the states. If this occurs, it is constitutionally irrelevant whether the national count is half or double its "true" level or somewhere in between. The same percentage distribution of the national population among the states will result in the same apportionment, regardless of the level of the national population. Unless they result in the correct distribution of the national population, improvements in the numeric accuracy of state population totals are similarly uninformative on the issue of representational equality. Adding 30,000 to the population total of a state whose "true" undercount was 50,000 would improve the

numeric accuracy of the state's count, as would adding 120,000 to the population of a state whose "true" undercount was 80,000. But if the result would be to cause the first state to lose a seat in Congress, to which it would be entitled under the states' "true" populations, equality of representation does not improve, but deteriorate, by increasing numeric accuracy.[31]

The Art. I, § 2 redistricting standard relied on by the court of appeals places the burden on parties challenging a state's plan to establish that population differences could have been reduced or eliminated by a good-faith effort to draw equal population districts (Pet. App. 36-37, citing *Karcher v. Daggett*, 462 U.S. at 730-31). In redistricting cases, this threshold burden is met by a plaintiff's putting forward a plan which achieves smaller population deviations than those under the state plan. The failure to come forward with such a plan defeats a plaintiff's claim. *See Karcher v. Daggett*, 462 U.S. at 731 ("if [redistricting plaintiffs] fail to show that the differences could have been avoided the apportionment scheme must be upheld"). If standards for congressional redistricting are to be applied to the census, the ability to point to a different apportionment using a different set of census totals does not answer whether the new apportionment improves equality of representation. *Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2778 (although different apportionment would have resulted from exclusion of overseas personnel from apportionment census, "certainly appellees have not demonstrated that eliminating overseas employees entirely from the state counts will make representation in Congress more equal"). Even accepting the court of appeals' characterization of the PES apportionment as being "just as accurate" as the census apportionment, "just as accurate" does not mean a better apportionment, only a different apportionment. The

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[31] An example of increased numeric accuracy causing representational equality to worsen is contained in the Secretary's adjustment decision (Pet. App. 183).

district court did not "implicitly" find that the census failed to achieve equality of representation as nearly as practicable. Rather the district court expressly found that plaintiffs failed to demonstrate at the national, state or local level, and for any reasonable definition of accuracy, that the adjusted numbers were superior to the census (Pet. App. 78).

C. The court of appeals' concern regarding the persistence of the differential undercount of minorities was understandable. But the existence of the differential undercount did not warrant the conclusion either that the Secretary had failed to achieve equality of representation as nearly as practicable or that the census denied representation on the basis of race or ethnicity.

To the extent the Second Circuit conceived of a right to be counted in the census, independent of the impact of census inaccuracies on equality of representation, its analysis of the census's differential count of minorities was not consistent with established Equal Protection principles. An equal protection violation based upon racial discrimination requires proof of discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-245 (1976). Here, plaintiffs did not allege any discriminatory purpose. Neither the adjustment decision nor the procedures selected for taking the enumeration census give the least hint of discriminatory purpose. The 1990 census was noteworthy for its concerted and comprehensive efforts to count minority residents.

The court of appeals' decision did not focus on the differential undercount's impact on non-representational interests, but on its effect on the allocation of representational rights. In this regard, the court of appeals did not err in concluding that a denial of representation on the basis of race or ethnicity does not require proof of discriminatory purpose. *Accord Tucker*, 958 F.2d at 1414 (redistricting cases do not place on plaintiffs any burden of proving that a malapportionment represents a deliberate effort to dilute some group's voting

power). If anything, positing a differential undercount as the reason for a loss of representation offers to prove more than is necessary. If the numbers used to apportion Congress result in an unintended but nevertheless avoidable malapportionment, then from a constitutional standpoint it does not matter why this has occurred but *that* it has occurred. *See ibid.* (in redistricting cases, "[i]t is enough that the state's electoral districts *are* malapportioned.")

Instead, the court of appeals' error lay in its assumption that the existence of the undercount differential meant that representation had been denied to begin with. Representatives in Congress are apportioned to states, not racial or ethnic groups. Every state has racial and ethnic minorities, and the effect of changing a state's apportionment is the same for all its residents, regardless of race or ethnicity. Taking a House seat from Wisconsin reduces the representation of black voters in Milwaukee to the same extent as it reduces the representation of white voters in Green Bay, Menominee voters in Keshena and Hmong voters in Eau Claire. Whether a particular ethnic or racial group's representational rights can be improved through a different apportionment of Congress is the same question as whether the apportionment can be improved. Unless adjustment will improve equality of representation in Congress, all that is accomplished by shifting seats in Congress from states with relatively small minority populations to states with relatively large minority populations is an arbitrary reallocation of rights of political representation.

The differential undercount provides a highly stylized reason for why the census *might* result in inequality of representation in Congress. It does not answer the question of *whether* this has occurred or, if it has occurred, how to correct it. The complex texture of the PES estimates involved much more than the measurement

of racial and ethnic undercount differentials nationally.[32] More importantly, there was no finding that the census resulted in inequality in the apportionment of Congress or that the adjusted numbers would improve equality. Accordingly, the court of appeals erred in holding that the adjustment decision was subject to heightened equal protection scrutiny.

III. THE SECRETARY'S DECISION WAS CONSTITUTIONAL.

A. Plaintiffs did not contend that the decision to adhere to the enumeration census contravened constitutional text or history. To the contrary, over and above the broader conflict between claims of constitutional entitlement to specific census innovations and Congress' constitutional and historically exercised authority to direct the manner of taking the census, aspects of the PES conflicted with constitutional language and principles.

Even if the Secretary's decision regarding the use of the adjusted numbers had not led to further litigation, the PES numbers would have been untimely. The actual post-census survey was not begun until nearly three months after the April 1 census date. Because of the process's complexity, initial results of the PES were not reported until April 1991 and revised estimates were not reported until June 1991, which continued to contain errors not corrected until the following spring. The evaluation of the estimates was not sufficiently completed to permit a decision until July 15, 1991. The adjustment decision,

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[32]If all that mattered to the states' census coverage rates was the proportion of their populations consisting of minority racial and ethnic groups, the PES would have looked much different than it did. States such as Rhode Island, Massachusetts, Pennsylvania and Wisconsin would not have had estimated undercount rates below the average for non-Hispanic whites nationally, and states like New Jersey, Michigan and Illinois would not have undercount rates roughly half those estimated for Montana, Wyoming and Idaho. *See* A.R. App. 10 (June 13, 1991, Release), Table 5.

therefore, was not made until more than six months after the President's report of the states' apportionments to Congress, 2 U.S.C. § 2a, and more than three months after the time established for the provision of P.L. 94-171 data for use in state redistricting. 13 U.S.C. § 141(c). The substitution of the adjusted numbers for the enumeration census would have required states to begin again the politically complex task of redistricting or--what would have been still more disruptive--to become embroiled in litigation as to the numbers to be used in redistricting. Efforts to achieve greater census accuracy at the cost of impairing the states' ability to establish new districts and hold elections present no clear improvement in representational equality.

Adjusting the census would have represented the first time in the nation's history that the states' apportionment populations would have been based on counts in other states (Pet. App. 251-52). Statistically, this fact implicates the problem of assuming homogeneity of the sample strata--the assumption, for example, that African-American residents of Madison had the same chance of being counted in the census as their post-stratum counterparts living in Peoria. Yet Wisconsin showed a significant increase in its African-American population between 1980 and 1990--indicating relatively recent immigration into the state--not witnessed in other states in the East North Central census region.[33] Constitutionally, the reliance on sample observations in other states to

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[33]Wisconsin's African-American population grew by 33.5% during the decade of the 1980's, compared to less than a 4% overall increase in the state's population--one of the reasons the state was able to retain a ninth House seat. During the same period, growth rates in African-American populations in the other East North Central states ranged from 1.2% in Illinois to 7.9% in Michigan. Source: U.S. Department of Commerce Bureau of the Census, *1980 Census of Population: General Social and Economic Characteristics*, United States Summary at 1-277, Table 232 (1983); U.S. Department of Commerce Bureau of the Census, *1990 Census of Population: Summary Population and Housing Characteristics*, United States Summary at 59, Table 2 (1992).

estimate a state's population conflicts with the requirement that representation in Congress be based on the states' populations, "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

The use of statistical estimation techniques to "correct" the results of the enumeration census also meant that state and local officials would no longer have an incentive to encourage residents to take part in the census. A significant problem in the 1990 census was a lower than anticipated response rate during the initial mail-out/mail-back phase (Pet. App. 15, 327-28). Wisconsin actively encouraged its residents' participation in the census, achieving the highest voluntary response rate in the nation (J.A. 95-101; A.R. App. 6 at 40). To reward these efforts and this accomplishment by taking away the state's ninth House seat could not send a clearer message regarding the value of performing this single duty of national residence. Undermining the ability to achieve accuracy in future censuses impairs, and therefore conflicts with, the goal of equality of representation.

More broadly, the use of statistical estimation acquiesces in broader trends of citizen non-involvement in the processes of self-government, particularly among population groups whose historic underinclusion in the census has corresponded to a much greater, and much more serious, underinclusion in the political process. The PES penalized states, like Wisconsin, whose high rate of voluntary census participation corresponded to high rates of voter participation. This result is contrary to the constitutional judgment reflected in Section 2 of the Fourteenth Amendment that equality of representation is furthered by apportioning representation in the national government in proportion to the degree that states have effectively extended the right to vote.[34] Similarly,

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[34]Wisconsin imposes a ten day residence requirement on voting and does not require voter registration. *See* Wis. Stat. § 6.55 (eligible voters permitted to vote by producing evidence of current address on day of election). According to Census Bureau estimates, Wisconsin's level of

statistical estimation undermines the perceived legitimacy of the allocation of representational rights at both the state and national level. *Cf. Montana*, 503 U.S. at 465-66 (noting states' and nation's acceptance for half a century of congressional apportionments based on method of equal proportions as factor supporting method's constitutionality). Procedures selected for taking the enumeration census--expanded targeted outreach programs, increases in enumerators assigned to canvass minority neighborhoods, simplified census forms--will have representational consequences, but these are very difficult to know in advance. *See* Pet. App. 228 ("small changes in the census enumeration can move seats in the House . . . but no individual involved in the enumeration process can predict how"). In contrast, the extreme sensitivity of the statistical estimates to modeling assumptions and methodological choices opens the process to political manipulation. Beyond this, no state would view as legitimate a loss of representation from that already established by the President which may represent nothing more than random sampling error, which results from a statistical process that introduces as many sources of error as it is attempting to "correct," which is based on a sample that includes only 141 blocks from within the state and which estimates the state's population using sample observations primarily from other states.

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voter participation is significantly higher than national averages, both for minority and non-minority voters. *See* U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-440*, "Voting and Registration in the Election of November 1988" at 36-40 (1989); U.S. Department of Commerce Bureau of the Census, *Current Population Reports, P 20-466*, "Voting and Registration in the Election of November 1992" at 23-30 (1993). *See also* The Council of State Governments, *The Book of States 1994-95* at 226, Table 5.9 (Voter Turnout For Presidential Elections: 1984, 1988 and 1992) (1994). The provision of Section 2 of the Fourteenth Amendment for a reduction in the states' apportionment populations in the proportion to the percentage of male citizens whose right to vote "is denied . . . or in any way abridged" has been held a political question. *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972).

B. At the very least, the Secretary's decision was consonant with the goal of equal representation.

The issue is framed by the availability of two sets of census numbers, each different from the other down to the block level. The *ex post* availability of two census results resolves plaintiffs' claim that a failure to estimate the census would result in representational inequality in the creation of their own congressional and legislative districts. "The simple answer . . . is that [plaintiffs do] not have to utilize the census figures in apportioning [their] legislative districts . . . ." *Cuomo v. Baldridge*, 674 F. Supp. at 1105 n.31.[35] The district court ordered the release of adjusted block-level data to the plaintiffs two and a half years ago (Pet. App. 91-95). To the extent plaintiffs have not used the adjusted data to draw new districts, their commitment to principles of equality, like their belief in the superior accuracy of the adjusted counts, rings hollow.[36] To the extent the plaintiffs have redrawn

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[35]*Accord, Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) (if state knows that census data are under-representative, it "can, and should, utilize noncensus data in addition to the official count in [the] redistricting process"); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992); *City of Detroit*, 4 F.3d at 1373-74; *Young v. Klutznick*, 652 F.2d at 624-26. *See also Kirkpatrick v. Preisler*, 394 U.S. at 535 (suggesting approval of population inequalities in congressional districts to reflect anticipated population shifts if population trends are thoroughly documented and applied in a systematic, and not *ad hoc*, manner).

[36]While it is difficult to have confidence in the interpretation of other states' redistricting statutes and case law, Wisconsin is not aware of any plaintiff state whose legislative or congressional districts were established after the district court ordered the release of the block-level adjusted data. *See e.g.*, N.Y. State L. (McKinney 1995) § 111 (congressional districts, effective June 11, 1992), § 121 (legislative districts, effective May 4, 1992); Ariz. Rev. Stat. Ann. (1994) § 16-1102 (legislative districts, effective June 16, 1992); *Arizonans For Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) (three-judge court) (congressional districts), *aff'd mem. sub nom., Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 113 S. Ct. 1573 (1993).

their districts, an order compelling a mid-decade change in the decennial census is unnecessary. New York City does not have an interest in compelling Oklahoma's or Indiana's use of the adjusted numbers.[37]

The *ex post* availability of two sets of census results also changes the evaluation of plaintiffs' claim to a specific census innovation. In their complaint, plaintiffs presented a plausible theory for why anticipated errors in the census might result in reduced representation. The claim went beyond a critique of census accuracy to offering a specific, previously untried, method for "correcting" the results of the decennial census. As it turned out, neither claim was correct. While a differential undercount was confirmed, the PES did not change the congressional apportionment of five of the plaintiff states, and both New York and New Jersey would have lost population as a share of the national total under the adjusted numbers. That two of the plaintiff states would have each gained a seat in the House of Representatives under the estimated counts merely begged the question of whether they were entitled to additional representation--and whether Wisconsin and Pennsylvania deserved to lose representation--under the states' "true" populations.

In *Franklin v. Massachusetts*, the challenged census decision was the inclusion of overseas populations in the states' apportionment totals based on "home of record" data. The allocation of overseas personnel to the states had occurred two other times, in 1900 and 1970. 112 S. Ct. at 2771. "Home of record" data were known to exhibit a

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[37]In addition, the provision of census data used in state redistricting is statutory. *See* 13 U.S.C. § 141(c). To the extent this statutory function makes the adjustment decision reviewable under the Administrative Procedure Act's arbitrary and capricious standard, *see Franklin v. Massachusetts*, 112 S. Ct. at 2782 (Stevens, J., concurring in part and concurring in the judgment), the plaintiffs did not challenge, and the court of appeals did not disturb, the district court's findings that the Secretary's decision satisfied this standard.

high "error rate" and possibly little correlation with an employee's true feelings of state affiliation. *Id.* at 2786 (Stevens, J., concurring in part and concurring in the judgment). Indeed, a man or woman who designated a home of record upon entering military service could not change it later. *Id.* at 2786 n.22. Nevertheless, the Court concluded that the Secretary's decision to include this very imprecise measure of the states' overseas populations "does not hamper the underlying constitutional goal of equal representation, but assuming the employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality." *Id.* at 2778 (opinion of O'Connor, J.). The members of the Court who viewed the decision as reviewable under the APA's arbitrary and capricious standard found it to have been neither. *Id.* at 2786-87 (Stevens, J., concurring in part and concurring in the judgment).

Here, the Secretary's decision rested on a comprehensive evaluation of highly technical issues of statistical interpretation. Given that the distributional accuracy of the PES determined its impact on equality, it was consistent with the goal of equality of representation for the Secretary to weigh the many sources of error that impaired the distributional quality of the estimates. For example, it was consistent with the goal of representational equality for the Secretary to question the validity of the PES's central assumption of sample homogeneity, where substantial evidence contradicted the assumption. It was also consistent with the goal of equal representation for the Secretary to be concerned that the estimates had been derived under severe time constraints, employing untested modeling assumptions. It was consistent to consider the estimate's instability with respect to congressional apportionment.

Again, a standard of consistency is different from one of mandated actions. Where statisticians intensely disagree as to whether a sample has been constructed, taken and statistically manipulated in a manner that yields a "better" distribution of the population, a decision

regarding the choice of census totals necessarily "commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. Stated otherwise, a state's claim to an additional House seat which is premised on a modeling decision to exclude 28 out 1,392 variance outliers during variance "pre-smoothing" does not invoke "a substantive standard of commanding constitutional significance." *Id.* at 463. Even those tending to favor adjustment, which included the Census Bureau's director and the district judge himself, found the Secretary's technical and policy evaluation reasonable. If it was reasonable to conclude that the adjusted numbers would not improve, and possibly worsen, the distributional accuracy of the census, it was consonant with the goal of equal representation not to substitute the adjusted numbers for those officially reported. The Secretary acted constitutionally.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

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